



EPA Region 5 Records Ctr.



275558

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October 21, 1999

VIA FACSIMILE 312-886-7160

Craig Melodia  
Assistant Regional Counsel  
USEPA Region 5

Re: *Skinner Landfill Site*  
*West Chester, Ohio*

Dear Craig:

Pursuant to your telephone request this morning, please find the relevant narrative from John Barkett's Preliminary Allocation Report pertaining to BFI.

BFI is settling with the Skinner Landfill Work Group for the tasty sum of \$81,179.64.

Please let me know if there is anything else you need.

Sincerely,

LATHROP &amp; GAGE L.C.

By:

Jonathan R. Haden

Enclosures

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**BROWNING-FERRIS INDUSTRIES OF OHIO, INC. ("BFIOH" or "BFI")**

BFIOH claimed that it has never transported any waste to the Site, arranged for disposal there or generated any waste that was disposed of at Skinner. The company [and its affiliates] had/have a number of other facilities in the area, including Big Foot Run Landfill [a/k/a Stubbs Mill Landfill], Bobmeyer Road Demolition Landfill, Bond Road Landfill, district hauling facilities, Cincinnati Recyclery, Cincinnati Medical Waste and C.E.C.O.S. International, Inc. [Abner Road Hazardous Waste Facility]. Also, BFIOH acquired a number of haulers and landfills in the area during the relevant time period including: Bradbury's Rubbish Disposal, Inc. [1970], Brotherton Disposal, Inc. [1972], C & I Refuse, Inc. [1970], City Ash, Inc. [1970], Granger Leasing, Inc. [1970], Quick Trash Service, Inc. [1970], Trumbull Sanitary Landfill, Inc. [1973], Testa Bros., Inc. [1971], Yeagers' Development Company [1972], Fairfield Industrial Development Organization, Incorporated [1972], Empire Sweeping Company [1984], and Glen Willow Properties, Inc. [1992]. Except for Clarke Services, none of the other acquisitions has been identified as using the Skinner Site.

The company stated that by contract dated March 1, 1984, it purchased certain assets of Clarke Services, Inc. but did not assume any of the liabilities. A copy of the acquisition agreement was submitted consisting of an Assignment and Bill of Sale and exhibits listing vehicles and other equipment and a breakdown of the purchase price between the equipment (\$575,000) and the customer list (\$725,000). The Assignment and Bill of Sale is executed by Clarke Services, Inc., as Seller, Dick Clarke, as sole shareholder, and BFIOH, as Buyer. The purchase price was \$3.3 million and included equipment, a telephone number, contractual rights and powers relating to Seller's solid waste collection and disposal business in and around West Chester, Ohio. There are mutual indemnifications. Paragraph II states: "Nothing in this Assignment and Bill of Sale shall in any way obligate Buyer for any liabilities or obligations of Seller except for those specifically scheduled and attached hereto and specifically agreed to be assumed by Buyer." On the same date, the following documents were also executed: (1) Contract to Purchase between BFIOH, as Purchaser, and Landfill, Inc., as Seller, concerning real estate known as Stubbs Mills Landfill together with machinery, equipment and trucks for \$2.32 million; and (2) a Noncompete Agreement among BFIOH, as Buyer, Clarke Services, Inc., as Seller, and Dick Clarke, as Stockholder, covering West Chester, Butler County and the area within a 100-mile radius of the company's principal place of business for a 5-year period. The sale of the real property was closed on September 4, 1984. On that same date, an agreement between BFIOH and Clarke's Incinerators, Inc. (Marty Clarke) was signed granting Clarke's the right to transport and dump refuse at the sanitary landfill operated by BFIOH on Morrow-Millgrove Road, South Lebanon, Ohio for 6 years.

BFIOH stated that it hired some, but not all, of the employees of Clarke Services but did not retain any of the supervisory personnel. It did not purchase the headquarters of Clarke Services but moved the purchased assets to its own facility on Vine Street in Cincinnati. BFIOH did not use the Clarke name after the acquisition and did not hold itself out as a continuation of Clarke or Landfill, Inc. BFIOH claimed that it promptly painted the vehicles and containers with BFI's color and logo and, along with Clarke, sent a form letter to Clarke's customers stating that Clarke would no longer be in the hauling business and offering BFIOH's services to them. BFIOH cannot locate a copy of this letter.

BFIOH claimed it never took waste to the Site and it is not a successor to Clarke Services, Inc. The company said that all "credible" witnesses agree that BFIOH did not take waste to the Site.

On May 28, 1991, the assets of BFIOH were transferred to BFI Waste Systems of Ohio, Inc., another wholly-owned subsidiary of Browning-Ferris Industries, Inc. BFIOH used the trade name Huth Disposal Service from May 1984 to May 1989.

In response to follow-up questions, BFIOH stated that it interviewed 21 additional persons and reviewed additional documents. Based on this further investigation, BFIOH stated that it continues "to believe that it never transported any waste to the Skinner Site, arranged for any disposal there, or generated any waste disposed of there."

BFIOH interviewed five current employees who formerly were employed by Clarke Services, Inc. They recall the following Clarke customers: Sun Chemical, Borden Chemical, several construction companies, several shopping centers, General Electric, Dubois Chemical, C.M. Paula, Levitz Furniture, Children's Hospital, and Procter & Gamble. Only one of these employees, Michael Tumulty, recalled transporting waste to Skinner while he worked for Clarke. He said he once transported 20 or 30 cy of roofing shingles. Mr. Tumulty believed the shingles came from the residence of a relative of Dick Clarke. He does not believe that any other Clarke employee used Skinner because Clarke Service's employees were instructed to use the Big Foot Run Landfill in Morrow. BFIOH stated that it had no other information about Clarke's customers at the time of the acquisition. BFIOH claims that when it hauled demolition debris in the 1980s, it typically transported the debris to the Bobmeyer Road Demolition Landfill in Fairfield. It did not typically segregate certain types of demolition debris.

In response to a follow-up question asking it to describe the operation of other landfills in the West Chester area, BFIOH provided the following information:

**Bigfoot Run Landfill (a/k/a Stubbs Mills Road)** – In 1984, BFIOH purchased this tract from Landfill, Inc., which had operated it since the early 1970s. In about 1985, BFIOH purchased an additional tract. The company still operates this site which accepts commercial, industrial and special waste.

**Bond Road Landfill, Hamison, OH** – In November 1973, BFIOH leased 105 acres. It appeared there was an earlier lease. On April 8, 1980, BFIOH entered into an agreement with Monsanto to operate the landfill. This agreement ended in 1995. Monsanto currently owns that site.

**Bobmeyer Road Demolition Landfill, Fairfield, OH** – A predecessor of BFIOH purchased this property in September 1972. That entity was merged into BFIOH in 1973. The landfill opened in 1972 and closed in 1986. It received primarily MSW and some commercial and industrial waste. The site is currently licensed to receive construction and demolition debris in the northwest and western portions of the closed sanitary landfill.

**Successor Issue.** At this point in the process, I will not address the successor issue. Dick Clarke, the principal of Clarke Services, is still available and has made no claim of an inability to pay. I have focused Clarke Services' allocation on Dick Clarke and his brother as is discussed below.

I note here that the Sixth Circuit does require that State law be applied to a claim of successor liability under CERCLA. However Ohio law might come out on the facts of this particular party, I do note that there is another theory that may create an allocation responsibility. In United States v. Atlas Minerals, 41 ERC 1417, 1488 (E.D. Pa. 1995), the district court found that a party was not a successor but allocated the alleged predecessor's share to the party as a matter of equitable allocation in lieu of orphaning the share to other liable parties. In Atlas Minerals, the alleged successor was the only party that "had any nexus" to the assets of the alleged predecessor. But given the Clarkes' presence, I am not addressing this issue with respect to BFIOH at this time.

**Site Selection.** BFIOH also argues that there is no proof on this record that it selected the Skinner site for disposal. Hence, it argues it has no liability. I am not interpreting the CMO as requiring that the discovery process that all of us went through would be a surrogate for complete discovery at trial. Understandably, since BFIOH took the position that it disposed of no waste at the Site, it did not tell me anything about how sites were selected for disposal. However, since I determine below that some waste reached the Site on BFIOH vehicles, I have no difficulty concluding on this record and as part of this process, that BFIOH, or at least one or more of its drivers, necessarily selected the Site for disposal.

**Waste-in Amount.** This is another party where there is an irreconcilable conflict between the testimony of witnesses and the interviews conducted by BFIOH. BFIOH said it never disposed of waste at the Site. Dexter Gregory testified to the disposal of some waste briefly when he first began working at the Site. After some discussion, he could recall two disposal events of what he called "wreckage." David Jividen estimated that he saw BFI dispose of demolition waste in 30 cy roll off containers on the average of about 75 loads per year, or 150 loads for two years. Rodney Miller recalled seeing a 20 cy or 30 cy BFI roll off truck at the Landfill two or three times in the 1978 - 1981 time period. A driver for King Container said that he saw BFI using the Landfill, according to King's February 10, 1998 Response to Follow up Questions (p. 6).

Elsa Skinner said that she recalled being told by her husband or son, John, that BFI used the Site. She could provide no other information. Ray Skinner said that in the 1960s BFI drivers used the Landfill because of its proximity to a number of BFI customers.

BFIOH argues that it reviewed its accounts payable records in the 1980s and found no evidence of payments to the Skinner Landfill. Unless its drivers paid cash on their own, BFIOH argued, it had no record of payment for the usage of the Skinner Landfill. BFI is not in the Skinner log, but that is not conclusive of much. Dervin Spears, a telephone interviewee after the deposition process was ended, was a former Clarke and then BFI driver. His statements do not support the position that BFI never used the Skinner Landfill.

I am unable to reconcile the absence of accounts payable records in the late 1980s with the testimony of Messrs. Jividen and Gregory. One of the limitations of a short-form allocation process is that there is no meaningful way to verify the availability of all of the relevant records and the thoroughness of the accounts payable review effort. The testimony before the 1980s amounts to a small amount of waste. The Rodney Miller testimony would represent 40-90 cys. The Ray Skinner testimony relating to the 1960s was not quantified by him but it is difficult to assign it much more than a nominal allocation value. Let's hope that a district court judge never has to try to deal with this conflicting evidence.

Based on the record and in the interest of consistency, I have elected to credit the direct testimony and to partially credit the Ray Skinner testimony and have derived a waste-in amount of 3,598 cys for BFIOH by taking the mid point of the Rodney Miller testimony (2.5 trips times 25 cys, or 63 cys), the Dexter Gregory testimony (2 loads times 30 cys, or 60 cys), the Ray Skinner testimony (I have assumed 5 trips and a 20 cy container with no compaction, or 100 cys) and the David Jividen testimony (75 loads times 30 cys per load times 1.5 years which was reduced from 2 years as a device to give some credit to the accounts payable records information presented by BFIOH, for a total of 3,375 cys). It appears that most if not all of this waste would fall into the demolition waste category.

BFI also argues that transporters should be assigned, as a group, a separate share in any allocation and that the share should not exceed 8%. I deal with this issue in the allocation discussion below.

**LATHROP  
& GAGE**  
LAW OFFICES

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October 20, 1999

**VIA TELECOPY 312-886-7160**

Craig Melodia  
Assistant Regional Counsel  
USEPA Region 5

*Re: Skinner Landfill Site  
West Chester, Ohio*

Dear Craig:

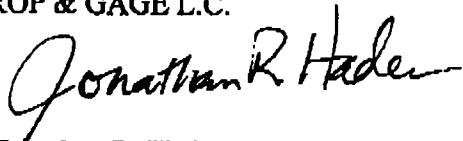
Pursuant to your request on the telephone, enclosed please find the relevant documents from John Barkett's Final Allocation Report pertaining to the recommended share of BFI. Let me know if the quality of the fax is not adequate or if you need anything further.

Please keep me advised of the status of the consent decree.

Sincerely,

LATHROP & GAGE L.C.

By:

  
Jonathan R. Haden

Enclosures

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*Skinner Landfill Superfund Site*

**Final Allocation Report and Recommendations**

**John M. Barkett  
Allocator**

**April 12, 1999**

**BROWNING-FERRIS INDUSTRIES OF OHIO, INC.**

In its November 9, 1998, comment brief, Browning-Ferris Industries of Ohio, Inc., ("BFIOH") supported the allocation methodology employed by the Allocator with one exception: the recommendation that no distinction be made between arrangers and transporters. BFIOH explained that the Allocator "attributed 3,375 cys of solid waste to BFIOH as if BFIOH had generated that waste, not merely transported it (allegedly) to the Site. (BFIOH continues to deny that it transported *any* waste to the Site)," and claims that in other CERCLA or similar allocations it has participated in, the allocator proposed separate transporter and generator shares - therefore it "encourages the Allocator to reconsider his preliminary recommendation in this regard."

I do not disagree that in many landfill allocations, transporters are treated separately from generators. By including transporters and generators together, I did not intend to treat transporters as generators of the waste. They are not. But transporters do transport waste and that waste can be converted to a volume. The fact that I treat certain parties together in one category is not intended to reflect on who generated the waste.

BFIOH states that the Allocator made a "default assumption" that it is a CERCLA liable party despite the lack of evidence of (1) site selection, and (2) hazardous substances.

**Site Selection.** BFIOH does not agree with the Allocator's conclusion that since some waste reached the site on BFIOH vehicles, "that BFIOH, or at least one or more of its drivers, necessarily selected the site for disposal," and states that "such an approach is not supported



by the language of CERCLA § 107(a) nor by any of the cases construing it." It goes on to claim that in so doing the "Allocator has circumvented the requirement in the Case Management Order that he make a preliminary determination of CERCLA liability for each party. First Case Management Order, ¶ 13(a)." I disagree. In this ADR process, there has not been full discovery or anything close to full discovery. I recognize that here BFIOH claimed that it never used the Skinner Site so that the site selection issue was secondary. Nonetheless, I have reconciled the evidence presented in the manner set forth in the Preliminary Report and linked BFIOH to the Skinner Site. Hence, site selection became an issue. Without addressing questions of burdens of proof here, the pattern of evidence was such that the Skinner Site was not typically selected by generators of waste and the evidence which formed the basis of the nexus to the Site were sufficiently suggestive of site selection by BFIOH that I remain comfortable with the determination for purposes of this ADR process.

**Hazardous Substances.** BFIOH stated there was no evidence that any waste "allegedly" hauled by BFIOH to the Site included any hazardous substance as defined in § 101(14), and disagreed with the Allocator's summary that "there is little question that ... construction and demolition debris, for example, each contain at least one hazardous substance ...". Preliminary Report, p. 27. It feels that the Allocator again relied on "a default assumption where there is no evidence of a critical element of CERCLA liability." I respect BFIOH's views on the hazardous substance question. I addressed this matter generically in the main body of the Preliminary Report and see no reason to deviate from the statements made there.

**Liability of BFIOH as a Successor to Clarke Services, Inc.** The Preliminary Report did not assign any responsibility to BFIOH in regard to Clarke Services, Inc. but solicited the views of the parties on this subject. No one responded to this invitation except BFIOH which argued that it had no such responsibility. For purposes of this Final Report, I am maintaining the position taken in the Preliminary Report and not assigning BFIOH any responsibility for Clarke Services, Inc.

**The Allocator's Attribution of Solid Waste to BFIOH.** BFIOH commented that the Allocator gave credence to the vague and conflicting testimony of Rodney Miller, Dexter Gregory, David Jividen and Ray Skinner and disbelieved BFIOH's own evidence that it did not use the Site. It goes on to object that the Allocator gave no value to the fact that not a single piece of documentary evidence tied BFIOH to the Site. BFIOH argued that, "If BFIOH was using the Skinner Landfill, it was doing so for free. In the real world, landfill owners and operators charge transporters for disposal." Again I recognize the conflicting evidence here and weighed it in a consistent manner applicable to all parties, including a weighing of the evidence presented by BFIOH. I wish I could have been able to please everyone but this job should not be undertaken by anyone who is looking to be liked. BFIOH is involved in enough landfill allocations that, I know, it understands the difficulties posed by the record in this case and the costs associated with a judicial resolution of this matter.

BFIOH's arguments about the evidence were made in its position paper and were considered in the Preliminary Report. I remain comfortable that I dealt with the evidence in an even mannered way and, therefore, am not disturbing the conclusions reached in the Preliminary Report.

Final Allocation Recommendations in Alphabetical Order, Skinner Landfill Superfund Site, April 12, 1999

	Solid	Liquid	Solid Waste		Liquid Waste						
	Waste In	Waste In	In Total	Percentage	In Total	Percentage	Solid	Liquid	Owner/	Rest of	Total
Name Of Party	Cys	Gallons	Cys		Gallons		Waste	Waste	Operator	Chem-	
			372906		282252				& Part of	Dyna	
									Chem-Dyne		

BROWNING-FERRIS IND OF OHIO INC	3598	0	372906	0.9647%	282252	0.0000%	0.10%	0.00%			0.09847%
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